

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

In re Marriage of GLORIA and MICHAEL
DOUGLAS WHITE.

2d Civil No. B165107
(Super. Ct. No. D282378)
(Ventura County)

GLORIA EVANGELISTA-WHITE,

Respondent,

v.

MICHAEL DOUGLAS WHITE,

Appellant.

Michael Douglas White appeals an order of the trial court awarding his wife, Gloria Evangelista-White, temporary spousal support and temporary child support. Michael contends that the trial court improperly excluded relevant evidence at the hearing, erred in determining his income available for support, and erred in determining the amount of time he had primary physical responsibility for his children.¹ We affirm.

FACTS AND PROCEDURAL HISTORY

Michael and Gloria separated in May 2001 after a 20-year marriage. They have two teenaged children. Michael's income, and the income of the community,

¹ We refer to the parties by their first names for clarity.

consists primarily of rents and fees for the management of rental property owned by the community or partnerships in which the community has an interest. Gloria is an author of children's books but did not earn significant income from that endeavor. Total income to the community exceeded \$1 million in 2001.

In May 2001, Gloria filed a petition for dissolution of marriage and an order to show cause (OSC) seeking temporary spousal and child support. Based on declarations filed by experts retained by Michael and Gloria concerning the community's financial condition, Michael had between \$136,000 and \$160,000 in monthly income available for support. Michael admitted that approximately \$3 million in community assets were available for immediate distribution.

In November 2001 Michael and Gloria entered into a stipulation and order providing that "each party shall receive half of all income and half of all ownership related disbursements from all community property investments and other assets as a portion of his or her share of the community estate" (November 2001 Stipulation). The November 2001 Stipulation provides, among other things, that \$27,616 per month would be paid to Gloria from certain community assets and that Michael would "forthwith" disburse to Gloria half of the amounts in two specified investment accounts.

The court-appointed expert, William Pasich, submitted preliminary reports in May, November, and December 2002. The reports summarize cash flow available for support and state that the two principal sources of cash flow to Michael were compensation for his management of the community's real estate interests and a consulting fee from Sweda Company, a partnership in which the community has an ownership interest. The Pasich reports concluded that Michael had operating "profits" of \$754,000 in 2000, \$739,000 in 2001, and \$550,000 in 2002 (estimate). Pasich states that he did not know "how the cash was disbursed nor to whom in 2001," and that an accountant hired by Pasich would investigate and report on cash distributions and other financial matters.

The trial court conducted the hearing on Gloria's OSC for temporary spousal and child support on December 18, 2002, and issued its order on December 23,

2002 (Support Order). The Support Order relies on the Pasich reports in determining Michael's income in 2001 and 2002, and establishes his 2003 income as an average of his income in 2000, 2001 and 2002. The Support Order awarded Gloria spousal support in the approximate monthly amounts of \$8,500 from June through December 2001, \$4,500 in 2002, and \$12,000 in 2003 and later. The Support Order awarded child support in the approximate monthly amounts of \$9,400 in 2001, \$4,500 in 2002, and \$4,600 in 2003 and later.

DISCUSSION

Temporary Support Order Appealable

An appeal may be taken from a family court order directing the payment of temporary child support or temporary spousal support. (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368; see also Code Civ. Proc., § 904.1, subd. (a)(10).) The order is appealable because it determines with finality the rights of the parties to temporary support and requires no further judicial action other than enforcement. (*Skelley*, p. 368.) Despite this established rule, Gloria contends that the Support Order is not appealable because the trial court retained jurisdiction to modify the order. We disagree.

The Support Order is based on the assumption that payments to Gloria pursuant to the November 2001 Stipulation had been made and states that "the court reserves jurisdiction to modify support in 2001 between May and October if ultimately Wife is not paid these cash distributions." This proviso does not reserve jurisdiction to change the amount of spousal or child support retroactively. Instead, it concerns enforcement of Michael's support obligations if he has not fully performed the November 2001 Stipulation. (See *In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1359.)

No Error in Excluding Evidence

A court has the inherent power to exercise reasonable control over its proceedings. (*Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1321.) In particular, a family law court may expedite hearings on motions and OSC's to conserve finite judicial resources as long as the court does not deprive a litigant of his or her rights to a full and fair hearing based on the evidence. (*Id.*, at pp. 1318-1319.) Trial courts also

have statutory discretion to limit the admission of cumulative and repetitive evidence. (Evid. Code, § 352.)

Michael contends that the trial court denied him a fair hearing by refusing to admit into evidence two declarations filed a few days before the support hearing. We disagree. The court acted reasonably in excluding evidence offered at the eleventh hour after weighing its probable value against Gloria's right to have her request for temporary support adjudicated. The court did not impinge on Michael's right to a fair hearing.

Gloria filed her OSC for temporary support in May 2001. The hearing was continued in order for the parties to file evidence and resolve issues. Michael filed his own declaration, and both parties filed declarations from experts stating their respective positions and responding to the other party's position. Court-appointed expert Pasich also responded to questions from Michael concerning Pasich's reports.

In November 2002, 18 months after the OSC was filed, Michael sought another continuance in order to present additional evidence. The court stated that it had sufficient evidence for a determination, but continued the hearing until December 18 to give Michael an opportunity to file written argument. Written argument was due on December 10. On December 12, Michael filed his own and an expert's declaration, but no written argument. On December 16, the trial court excluded the declarations, repeating its statement that further evidence would not be helpful.

No Error in Support Order

1. Standard of Review

Temporary spousal support is intended to preserve the standard of living enjoyed by the parties pending final division of their assets. (*In re Marriage of Winter* (1992) 7 Cal.App.4th 1926, 1932.) Unlike permanent support, an award of temporary support may be ordered in "any amount" subject only to the supported party's needs and

the supporting party's ability to pay. (Fam. Code, § 3600²; *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 594.)

Because the relevant considerations depend on the facts and circumstances of each marriage, trial courts have wide latitude in fashioning temporary support and a trial court's determination will be upheld absent an abuse of discretion. (*In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 165.) And, when a trial court's factual findings are challenged, the order will be upheld whenever the findings are supported by substantial evidence. (*Id.*, at p. 160; see also *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

The trial court has less flexibility in awarding temporary child support. With limited exceptions, the section 4055 guideline formula must be applied in the determination of both temporary and permanent child support. (§ 4052; *In re Marriage of Hall* (2000) 81 Cal.App.4th 313, 316-317.) The trial court, however, retains broad discretion to determine the facts and monetary amounts that are factored into the formula. (*In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1044; *In re Marriage of de Guigne*, *supra*, 97 Cal.App.4th at p. 1361.) Accordingly, a trial court's determination of those facts and amounts will be upheld absent an abuse of discretion. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1150-1151.)

2. Calculation of Supporting Spouse Income for 2001

Michael contends that the trial court awarded too much temporary spousal and child support for 2001 by erroneously including the entire \$749,000 consulting fee from Sweda Company as income available to Michael. Michael asserts that only one-half of the fee should have been treated as his income because he paid the other half of the fee to Gloria pursuant to the November 2001 Stipulation. We disagree.

The parties agree that Michael was obligated to pay Gloria one-half of the Sweda fee, but Gloria claims that he has not made the payment. The dispute is part of a broader dispute over the accounting of 2001 income and whether Michael has made all of

² All further statutory references are to the Family Code unless otherwise stated.

the payments to Gloria required by the November 2001 Stipulation. An October 2001 declaration by Gloria's expert states that substantial amounts received by Michael had not been distributed to Gloria. Michael's expert was uncertain about cash disbursements, and court-appointed expert Pasich also disclaims knowledge of how or to whom cash flow for 2001 has been disbursed.

In most cases, a trial court must determine temporary support before all the information necessary for permanent support orders and a final division of property is available. Given the conflicting evidence in this case, there was no abuse of discretion by the trial court in attributing the entire 2001 Sweda payment to Michael. Various questions concerning 2001 income remain undecided, and court-appointed expert Pasich is currently conducting an investigation to determine 2001 income and disbursements with finality. In the event it is established that Michael made the payment to Gloria, the trial court can make an order reflecting that information.

3. *Averaging Income*

Michael contends that the trial court erred by ordering temporary spousal support for 2003 and subsequent years based upon an average of Michael's income between 2000 and 2002. Michael argues that, because his consulting agreement with Sweda Company was scheduled to terminate in mid-2003, it was inaccurate and unreasonable for the trial court to estimate his income for 2003 and later years as an average of income from the immediately preceding years. We disagree.

Projecting future income by averaging prior income is an accepted method of determining future spousal and child support. Although imperfect, past income is generally a reasonable and fair indicator of future income. (See *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 820; *County of Placer v. Andrade* (1997) 55 Cal.App.4th 1393, 1396-1397.) Here, given the complexity of the community assets and the sources of income, the trial court did not abuse its discretion by finding that an average of his 2000-2002 income reasonably represented "actual or prospective earnings of [Michael] at the time the determination of support is made." (§ 4060.)

First, Michael argues that his agreement with Sweda Company was scheduled to end in 2003, but does not address whether the agreement may be extended or replaced by a business relationship in a different legal form that provides a comparable financial benefit to Michael. In light of evidence that the community owns an 8 percent equity interest in Sweda Company, the trial court could reasonably have concluded that this omission was significant.

Second, Michael did not propose a persuasive method of determining his 2003 income other than as an average of prior years. The trial court cannot be expected simply to assume that Michael's income in 2003 and later years will be substantially reduced.

Third, Michael is entitled to a payment from Sweda Company for his services performed in the first half of 2003, and the full impact of a termination of Michael's relationship with Sweda Company would not be felt even under the worst case scenario until 2004. Michael retains the right to seek a modification in temporary support at that time if the dissolution proceeding has not yet progressed to final judgment.

4. Primary Physical Responsibility for Children

One component of the section 4055 formula for determining child support is the "approximate percentage of time that the high earner has or will have primary physical responsibility for the children compared to the other parent." (§ 4055, subd. (b)(1)(D).) Michael contends that he spent substantially more time with his two children than the percentage of his primary physical responsibility attributed to him by the trial court. We disagree.

In a July 2001 stipulation, Michael and Gloria agreed that Gloria was "the primary caretaker of the children and their primary residence shall be with her" and that Michael shall have visitation on "alternate weekends, one evening per week for dinner, and such other and further times as the parties and the children agree." In effect, this arrangement allocated 80 percent of primary physical responsibility to Gloria and 20 percent to Michael. The stipulation has never been modified, but Gloria later stated that

after May 2002 each parent had 80 percent responsibility for one child and 20 percent responsibility for the other child.

The trial court reasonably and sensibly based its determination on this stipulation by the parties and Gloria's subsequent admission regarding a change in responsibility. The trial court found that Gloria had primary physical responsibility for both children 80 percent of the time through May 2002, and that each parent had 80 percent responsibility for one of the children thereafter.

5. Conclusion

Although self-evident, we are compelled to emphasize that a temporary support order is not a final determination of support and necessarily occurs before the record is sufficiently complete for the trial court to make a final determination. Often, the trial court is faced with a moving target as the parties are in the process of formulating and presenting their cases. Nevertheless, the support order must be made and, as an appellate court, our role is not to reweigh the evidence or reconsider the wisdom of the trial court's rulings.

The judgment (order) is affirmed. Costs to respondent.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Tari L. Cody, Judge
Superior Court County of Ventura

Lascher & Lascher, Wendy Cole Lascher, Gabriele Mezger-Lashly;
Rehwald, Rameson, Lewis and Glasner, and Thomas Trent Lewis for Appellant.

Taylor, McCord & Praver, Richard L. Taylor and Patrick G. Cherry for
Respondent.